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Supreme Court, U.S.
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No.

**SUPREME COURT OF THE UNITED STATES**

October Term, 2001

CLIFFORD J. JOHNSON, Petitioner

v.

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, ET AL., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

# PETITION FOR WRIT OF CERTIORARI

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69pp

## QUESTIONS PRESENTED

If, to enforce a private contract, a (state) court issues an order that operates to deter the filing of prospective claims under the False Claims Act, without the government having been informed, is the order void as against public policy?

If, to enforce a private contract, a (state) court issues an order that operates to deter the reporting of *any* information that might be of interest to federal regulatory agencies, is the order void as against public policy?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings herein, and in the state courts, are: petitioner, Clifford Johnson; principal respondent the Board of Trustees of Leland Stanford Junior University; and respondents Cedric Bennett, John Sack, and Robert Street.

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## JURISDICTION

Pursuant to 28 U.S.C. § 1257(a), petitioner Johnson seeks a writ of certiorari to review the decision of the Court of Appeal for the State of California, Sixth Appellate District, filed April 20, 2001 (No. HO20137). Appendix 4, pp.37-54.

Petitioner contends that, because it issued without the federal government having been informed, and affirms a judgment that threatens substantial penalties should he so act, the decision violates public policy, and so impermissibly invades his rights:

(1) to file claims under the FCA; and

(2) to tell the government what sum Stanford agreed to pay him to settle a state suit and promise not to file prospective claims under the FCA.

The court of appeal denied a Petition for Rehearing by order filed May 24, 2001. P.55. The Supreme Court of the State of California denied a discretionary Petition For Review by order filed July 11, 2001. P.56.

The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rules, Rule 13.3.

## CONSTITUTION AND STATUTES

This petition involves the rights of the United States and of petitioner to utilize the provisions of the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.* Relevant parts of the FCA are set forth at pp.57-61.

The petition also involves the First Amendment's prohibition against "abridging the freedom of speech, or of the press," to the extent that it contributes to the public policy that protects communications to regulators.

## STATEMENT OF THE CASE

### 1. Introduction

Petitioner Johnson filed suit against respondents in 1994, alleging state tort and contract claims arising from the allegedly pretextual termination of his employment by Stanford University, after eleven years employment in the Stanford Data Center, an administrative unit. The individual respondents comprise his line managers.

Stanford, a private educational institution, receives hundreds of millions of dollars each year from the Department of Defense, in research grants that include payments for administrative overheads. Petitioner's functions included measuring, for billing, planning, and performance purposes, the utilization of Stanford's most expensive administrative resource, mainframe computers. His responsibilities included calibrating an "accounting

factor," applied to all charge-outs. Besides supporting Stanford's administrative information systems, these computers were used by every kind of organization associated with the University. As a result, a multi-million dollar annual volume of diversely charged back federal claims rested on petitioner's measurements.

In a struck pleading (p.11 n.7), petitioner obliquely alleged several regulatory violations, which he plainly could repackage as FCA claims. In attacking the judgment, this is the example he has regularly used to concretize the FCA claims issue.[1] Its merits were never reached:

> Said doubling of mainframe computing required the prompt unforeseen expenditure of funds in excess of a million dollars, and foreordained an unforeseen ongoing operating cost increase assessed in seven-figures per year, wherefore disclosure was mandated under 10 U.S.C. § 2036a(e)(1). Further, said doubling was largely due to one of a group of highly visible "CORE" accounts billed already politically low and

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[1] Supporting allegations included that, in 1991, after an agency investigation and two days of hearings, a congressional committee found that pervasive defects in Stanford's accounting systems had for years generated and obscured excessive, ballooning, and misallocated indirect cost claims, including one claim for the cost of mainframe computing. H. Rep. No. 33, 102nd Cong., 1st Sess., p. 68. In the same month that he learned of the decision to lay him off (April 1992), petitioner was contacted by government auditors researching this detail.

virtually fixed rates, notwithstanding fundamental federal regulations broadly prohibiting rate differences. Said doubling exploded this defect to the point at which some 90% of the mainframe services...were consumed by a group of accounts that was charged only some 10% of the Data Center's budget. By enormously stretching the differences in rates charged to various accounts, non-disclosure of the unforeseen doubling implicates an ongoing and unauthorized diversion of funds seemingly in excess of five million dollars annually, in violation of 48 CFR 31.3 parts B.3, C.2, C.3, C.4, E.2.d, G.1.a(3), and J.44. In sum, said doubling conclusively "broke" the Data Center's flawed indirect cost model, and non-disclosure would render its cost and pricing data pervasively defective, and even entirely disallowable and warranting double payback.

## 2. The Questions Arise As Narrow Matters Of Law, Because Petitioner Accepts The Findings Of Fact.

The trial court's judgment was entered pursuant to a motion brought by respondents under California Code of Civil Procedure, section 664.6, which provides:

> If parties to pending litigation stipulate...orally before the court for settlement of the case..., the

court, upon motion, may enter judgment pursuant to the terms of the settlement.

Such terms were put on record December 11, 1998. The court granted the motion to enter judgment on March 26, 1999, pursuant to the oral findings set forth at p.30, which petitioner herein accepts, as follows.

This petition challenges only the appellate affirmance of the settlement-enforcing judgment,[2] and it does so assuming, *arguendo*, the veracity of all findings as to the settlement terms, including that petitioner knowingly agreed:

(1) not to file prospective claims under the bounty hunter and whistleblower provisions of the FCA; and

(2) not to disclose the settlement sum to the federal government, unless compelled to by legal process.[3]

A favorable decision by this court would not only warrant remand for further consistent state proceedings, but would restore petitioner's rights to act under the FCA, to the extent they can be restored, given the lapse of time.

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[2] Other parts of the decision -- e.g., the affirmance of the rule that petitioner has no work product privilege, because he is not an attorney -- incidentally note that petitioner's injury is mooted by the judgment. They can be reconsidered in the event of remand.

[3] None of the evidence cited by either party re any issue on appeal contained any contradictory historic facts. Re these disputed findings of, accepted herein, respondents and court referred only to the settlement terms put on record, as did the court of appeal.

Given the accepted settlement terms, the affirmance of the judgment rests on only the following two parts of the appellate decision. As follows, the first part affirms the concomitant sealing order, finding no interest that could have warranted a public hearing, in part based on the order being "narrowly tailored" to the settlement terms (p.48-49):

> Plaintiff concedes that the parties' contractual nondisclosure obligations were an overriding interest.[4] This interest obviously would have been prejudiced by disclosure. Sealing the terms of the settlement was clearly the least restrictive means available to ensure the confidentiality of the settlement terms, and the sealing was narrowly tailored so as to seal only the terms of the settlement. There is no indication anywhere in the record before us that anyone other than plaintiff ever expressed any interest in these proceedings and would have opposed sealing if only a noticed hearing had been provided. A noticed hearing and express findings would have produced the same sealing orders.

The second at bar part of the decision comprises the dispositive grounds on which the judgment is affirmed as not against public policy (p.52):

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[4] Petitioner cited this as a *possibly* overriding interest, to be weighed against the public interest at a hearing.

> Plaintiff maintains that the judgment was invalid even if he validly agreed to its terms because he was entitled to subsequently rescind it "for illegality of consideration, and as against the public interest." The only "illegality" he mentions is his allegation that the judgment impaired his First Amendment right to freedom of speech and his alleged right to bring a federal action. First Amendment rights may be waived if the relinquishment is clear, knowing and compelling. (*Fallout v. Hampshire* (1999) 74 Cal.App.4th 1394, 1400; *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1398.) ... No "illegality" was involved in plaintiff's knowing and voluntary agreement to the nondisclosure obligation contained in the settlement. *Plaintiff fails to define any "public interest" which would be abrogated by his agreement to the nondisclosure term of the settlement. Similarly, plaintiff's waiver of his federal claims was not illegal nor against the public interest.*

The italicized conclusions are the conclusions of law that give rise to the questions presented. They are expressly bounded by the record, and so petitioner sufficiently states the case by fully presenting that record, under point 4 below.

### 3. The Settlement Negotiations And Rescission.

The following resume of facts reproduces text from the Statement of Facts in the Opening Brief on appeal, but is

substantially edited, unlike the excerpts given under point 4. Without undermining his acceptance of the state court's findings, for purposes of completeness, petitioner first recounts the wholly uncontradicted historic facts as to the settlement negotiations and his rescission.[5]

On September 11, 1998, mediation blew up at the last, because, in the standard release he was given to sign, he refused to accept restrictions as to federal claims and communications with federal agencies, specifically:

> [Plaintiff releases] any Claims under any...federal statute.
>
> [Plaintiff will not] abet, encourage, suggest, promote, commence, prosecute, or cause to be commenced, prosecuted, either by himself or in cooperation with any...governmental agency, any claim...before any... federal court.

Petitioner objected that these terms were improper, in light of Stanford's refusal to admit error.

By letter dated September 13, 1998, petitioner proposed the following compromise:

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[5] In reaching the accepted findings, respondents and court dismissed all these facts as inadmissible showings of "undisclosed intentions" -- undisclosed, that is, in the transcribed settlement terms, which they entirely relied on to support said findings. This is confirmed on the face of the court of appeal's decision.

> A gentleman's agreement would seem possible, in which I would give my word of honor as to non-disclosure, even to federal agencies by qui tam action or otherwise. Such a gentlemen's agreement would require changes of sufficient substance to cause me to believe the federal disclosure unwarranted, comprising credible admissions of mistake instead of the vague expressions of regret...accompanied by withdrawal of the absolute prohibition against future membership of the Stanford family.[6]

The offer was made through the mediator. In reply, respondents somehow persuaded the mediator to try and insist that petitioner was illegally holding on to his copy of the settlement draft.

On October 9, 1998, the Hon. Jacobs-May, Judge, initiated a judicially supervised settlement conference to resolve this impasse. To this end, the parties made joint and ex parte presentations at an October 19, 1998 conference. The conference was ultimately continued to December 11, 1998. On that day, the parties were surprised by the substitution of the Hon. Richard C. Turrone, judge. The conference comprised an ex parte session with respondents,

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[6] The last clause traded appellant's right to file an FCA action to set aside the retaliatory rehire bar that he would otherwise unconditionally accept so as to settle the state action. The court refused to resolve the specific controversy as to the release of this action. ("I'm not going to pass judgment on it." -- p.30.)

which lasted over thirty minutes, about a five minute ex parte session with appellant, before a brief joint session in which the agreed language was rehearsed, before being put on record.

In petitioner's ex parte session, the court asked whether he would accept the same terms, except that the restrictions as to FCA claims and communications with federal agencies would be dropped. Petitioner agreed, but began to explain his intentions re a federal suit, in light of the lack of an admission of error, inter alia. The court cut this short, advising him not to mention the federal issues because, being dropped, they were beyond the scope of the terms. As a result, federal claims were never mentioned with both parties present. The draft release was read into the record, the references to federal claims and federal agencies being deliberately skipped.

The settlement terms would not execute until the new year. Uneasy as to not having informed respondents of his intentions at the conference, by a December 29, 1998 letter, petitioner gave notice that he was preparing to file suit under the FCA, reciting that "by dropping its deal-breaking insistence on references to federal claims, Defendant decisively allowed" any such FCA action. By a January 11, 1999 letter attached to their settlement check, respondents replied that "under the terms of the December 11, settlement, you released your right to bring any such claim." Petitioner returned the check with a January 12, 1999 letter rescinding the settlement as void, owing to the misunderstanding. Since then, he has received nothing.

## 4. The Excerpted Record On Which Stands The Decision Of The Court Of Appeal.

Emphases and footnotes are in the original; [] indicates an abbreviating redaction and/or a continuity edit; [RC] replaces citation(s) to the record; [ref] indicates a reference to another page in the pleading. Occasionally, a reference is replaced by the text that is referenced.

A. Opening Brief, Statement of Facts: Re FCA Claims.

The *only* fought-over settlement terms are purported restrictions on claims arising from the violations of the FCA (10 U.S.C. §§ 2306a, 2324(c)(3)(A); 48 C.F.R. Ch. 1 § 31.3) particularly alleged in paragraphs 37-42 of the [disallowed] proposed complaint. [RC] "[U]nauthorized redistributions" include "both a disallowed seven-figure lump sum, and an ongoing diversion of funds seemingly in excess of five million dollars annually, [] subject to double payback." [RC] Also alleged are the misreporting of employee functions, and repudiations of extraordinarily mandated accounting priorities and policies.[7]

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7 The FCA violations are not sued on per se [which federal law would presumably preempt], nor is their rigorous proof required, although an exemplary award should consider their face value. They are properly bold facts the mere arguability of which shows federal jurisdiction over each of said seven simple statements of business fact [ref], each of which allegedly violates the False Statements Act (18 U.S.C. § 1001), and thus the implied-in-fact contract. This design reduces trial to a list disputed *surface* business facts, of which appellant has direct knowledge and

A cover-up of these violations allegedly motivated the pretextual termination and right to sue impairments that define the surviving claims; the loss of the public policy tort is by definition a right to sue impairment damage in the fraud claim; and such violations would surely bear on exemplary damages. Even so, stated as requests for admission they were held irrelevant beyond discovery, by order filed December 8, 1998.[8]

[] By letter dated December 29, 1998 [RC], appellant stated his intention to file an FCA suit, including a particular "retaliatory" claim (per 31 U.S.C. § 3730 (*h*); [RC]), and his understanding that "by dropping its deal-breaking insistence on references to federal claims, Defendant decisively

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documentary proof. See, e.g., [RC]. [] Appellant's model was *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418.

[8] RFAs No. 5-11; [RC]. The first in the set (RFA No. 5) was fundamental. It sought an admission:

> That, from 1987 through 1992, federal claims totaling millions of dollars per year were negotiated to pay for computer usage charged out by the Stanford Data Center.

This was denied as "insufficiently relevant," although, with all references to public funding and the FCA excised, the court did compel discovery re the computer usage and the *internal* budget for it. [RC]. A like excision of references to regulatory controls was effected re RFA No. 9. [RC]. The remaining requests, which merely asked that respondents admit federal jurisdiction over said statements of business fact, were denied as soliciting "a legal conclusion." [RC].

allowed" any such FCA action. [RC]. By a January 11, 1999 letter attached to their settlement check, respondents replied that "under the terms of the December 11, settlement, you released your right to bring any such claim." [RC] Appellant returned the check, with a January 12, 1999 letter rescinding the settlement as void, owing to the misunderstanding. [RC]

B. Opening Brief, Point 5: "The Judgment Is Against Public Policy Because It Impairs The Capacities Of The United States And Appellant To Utilize The FCA, [And] Invades Appellant's First Amendment Rights Re A Matter Of Public Concern."

The judgment gravely impairs Appellant['s ] rights of speech and action re the known FCA claims, waivable or not. As a matter of record, without the reinstated FCA release, appellant would early this year have initiated the FCA suit that he started preparing after the purported settlement, whereas he is instead exhausting his state remedies to annul the FCA reinstatement, *while his six-year limitation on the most substantial qui tam federal claims runs out.* The court was informed ~~of~~ this contingency when it made the FCA findings. [ref ]

[]In his December 29, 1998 [rescission] letter to respondents, [appellant wrote] [RC]:

> I should never have been expected to surrender the principle of complete communication that cost me my job over six years ago, on account of which I issued the still-suppressed April 9,

> 1992 memorandum to Defendant's Board of Trustees.

That most prized [RC], that doggedly defended, that smallest but spirit-saving residue of freedom, merely to mail documents to improbably interested federal agents; even that is taken and twisted by a finding of sellout, backed up by a disclaimer as to trial of fact,[9] and the victor's rule-setting sanctions-seeking follow through[, as follows].

On July 9, 1999, [post-facto] opposition to the motion for new trial was filed [RC], comprising: **(a)** mostly verbatim copy of filings in the section 664.6 motion...[RC]; **(b)** a request for sanctions (costs of $2,350); and **(c)** a half-page response to the public policy attack on the confidentiality provision. Without citing authority, respondents made their position plain [RC]:

> In the unlikely event the federal government needs to discover the terms of the agreement between Plaintiff and Stanford, then the federal government can presumably compel Plaintiff to disclose that information.

As for pursuing an FCA suit, just in case waiver *is* possible, appellant must now exhaust state remedies to set

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9 This refers to the summary denial of the motion for new trial, even before opposition was filed, imputing that the judgment involved no "trial of fact." P.36. The court of appeal assumed there had been a trial so as to affirm the order (pp.53-54), but *both* parties read it as grounded on there having been no trial of fact.

aside the finding of waiver. He is not even free to pursue an FCA suit based on his honest opinion as to waivability, even if correct, for he faces yet another attack for reneging on a promise, with inevitable frustration, risk, and skepticism to surmount. Moreover, a relator's action *must* commence with *voluntary* service on the government of "substantially all the material evidence and information the person possesses." 31 U.S.C. § 3730 (b)(2) [RC]. A related settlement sum is a most material fact.[10]

Uncertainty as to the imposition of a penalty is certainly not the salve the court seemed sold on, when it adopted the hypothetical non-waivability tautology as its on-the-merits mantra. It is basic that "[j]udicial construction must not create uncertainty inhibiting exercise of a constitutional right. [Citation.]" *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 519, and that official edicts that penalize expressive conduct must define

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[10] In *U.S. ex Rel. Killingsworth v. Northop Corp.* (1994) 25 F.3d 715, the United States declined to intervene in an FCA suit brought by a relator with a common law wrongful termination claim. *Killingsworth* settled the FCA claim for $1 million, and his wrongful termination claim for $3.2 million. The United States objected that the proportion allocated to the FCA claim was too low. Even after *Killingsworth* shifted $500,000 to the FCA sum, the United States filed to block the deal. *Held*: the United States had an interest in the related settlement sum, and the right to a hearing on charges of disproportionate allocation. See also *U.S. ex rel. McCoy. supra* (entire FCA settlement proceedings presumably public).

the conduct with narrowness and certainty. *Reno v. American Civil Liberties Union* (1997) 117 S.Ct. 2329, 2344-2346. Nor may free speech rights be invidiously closed to those "who do not have a full purse." *Murdock v. Pennsylvania* (1943) 319 U.S. 105, 112. The uncertainty of the judgment thus imposes an unconstitutionally chilling risk, by virtue of the confidentiality provision.

After the motion for new trial was denied, *California Teachers Assn. v. State Of California* (1999) 20 Cal.4th 327, at 335-346 confirmed that:

> [Penalty in event of adverse outcome] impermissibly chills the right to a hearing in every case in which [party] cannot know the ultimate outcome – in other words, in every case – even if [party] does demand and obtain a hearing. A litigant's non-frivolous assertion of a procedural right may not be chilled through fear of subsequent reprisals in the form of monetary penalties... more severe than that typically imposed on defeated parties. [Citation.]

More recently, *Linsley v. Twentieth Century Fox Films Corp.* (1999) 75 Cal. App. 4th 762, made it alarmingly clear that after paying the substantial penalty that utilizing the FCA now immediately draws, appellant risks a punitive attorney fee award, should the FCA claim be found waivable.[]

[As for confidentiality,] Appellant's opposition to entry of judgment included ([RC] orig. emphasis):

> The entire substance of litigation implicating federal regulation is very strongly presumptively public, *especially* where parties prefer confidentiality. ([Citation] "[D]isclosure of poor management in the past...is hardly a trade secret. Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know.") In particular, settlement proceedings in a 31 U.S.C. § 3730 action are presumptively public, to guard against "sweetheart" deals between a Defendant and *either* a relator *or* the government. *U.S. ex rel. McCoy v. California Medical Review* (1990) 133 F.R.D. 143.

Appellant developed this into a First Amendment public access issue in the motion for new trial, attacking the uncertainty of the judgment as follows [RC]:

> This "possible release" finding renders the expressly material confidentiality provision, which heavily penalizes communication of the settlement sum "unless compelled by legal process to do so," and which seals the judgment:
>
> **(a)** against public policy, in that it impairs the capacities of the United States and/or Plaintiff to utilize the provisions of 31 U.S.C. § 3730 (*U.S. ex Rel. Killingsworth v. Northop Corp.*

(1994) 25 F.3d 715; *U.S. ex Rel. DeCarlo v. Kiewit.* (1996) 937 F.Supp. 1039);

**(b)** an unconstitutional restraint on plaintiff's rights to speak freely under U.S. Const., Amnd. 1 ... (*Organization For A Better Austin v. Keefe* (1971) 402 U.S. 415...); and

**(c)** an unconstitutional restraint on the freedoms of the press under U.S. Const., Amnd. ... (*Cox Broadcasting Corporation v. Cohn* (1975) 420 U.S. 469; ...).

Since then, the First Amendment right of access to civil filings has been upheld under both federal and state law. *San Jose Mercury News v. U.S. Dist. Court* (9th cir., 1999) 187 F.3d 1096, 1101 held that the "right of access to court documents belongs to the public, and Plaintiffs were in no position to bargain that away."[]

C. Opposition Brief: The FCA Issue Was From The Outset Mooted By Limitations; Unwaivable Claims Are Not Waived.

This court need not address these arguments because they are moot. Johnson's purported FCA claims are time-barred. [His] allegations describe events occurring between 1984 and 1992. [RC] The statute of limitations for FCA claims is governed by 31 U.S.C. section 3731(b), which provides that a civil action under section 3730 may not be brought more than six years after the date on which the violation of section 3729 is committed or more than three

years after the date when the facts material to the right of action are known or reasonably should have been known, which ever occurs last. As Johnson alleges no misconduct relevant to the FCA occurring later than 1992, this six year statute expired sometime during 1998 at the very latest. Any such claims are clearly barred now, and, in fact were probably barred at the time Johnson advised the court of his interest in filing an FCA claim in October of 1998.

Accordingly, Johnson's arguments, that the settlement agreement must be struck down as impermissibly barring his right to file an action under the FCA or as interfering with his rights to discuss a claim under that act, should be ignored as completely frivolous for the reason that they expired years ago.[]

Johnson considers the settlement agreement's release of "any and all claims" to be the alleged "offense to public policy" because of his purported interest in later filing a claim under the FCA. As discussed above, this question is moot. Aside from that, as the trial court clearly indicated at the hearing on the entry order, "If there are claims that one cannot waive as a matter of public policy, then they haven't been waived... If the qui tam or some other unwaivable claim is out there , then it can be pursued." [RC] If Johnson is correct in his oft-repeated assertion that a qui tam claim under the FCA cannot be released, then it was not released by the settlement agreement, and there is no violation of public policy.

D. Reply Brief: "Respondents Conceal Their Expectation That FCA Limitations Would Expire In 2000"

In the January 11, 1999 letter attached to the settlement check [RC], Respondents volunteered, that, re an FCA claim:

> [T]he applicable statute of limitations has long since run...the whole issue of billings was the subject of an exhaustive review which was resolved with the government in 1994.

As shown at [ref], Respondents were thereafter informed that an applicable statute of limitations was six years, per 31 U.S.C. section 3731 (b)(1).

Respondents' brief conceals their publication of 1994 as the logical date from which FCA limitations run. Without citing a single case, they now affirm only that the statute runs from the date of the events that occurred in the course of appellant's 1992 termination (effective August 7, 1992), alleged at [RC], which they equate to all FCA violations on which appellant can sue. But the 1992 events comprise *internal* misrepresentations, stated as FSA (18 U.S.C. section 1001) violations, in that they *project* FCA non-disclosures. FCA suits to *recover* money can hardly accrue before government dealings are done.[11]

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[11] *TS Infosystems, Inc. v. U.S.* (1996) 36 Fed.Cl. 570, 572-573 very differently reviews conflicts in the federal courts as to whether the statute runs from the necessarily post-fiscal-year *submission,* or from the later *settlement* of a claim, and as to

E. Petition For Rehearing: "Legality Of Judgment"

At [RC], the court tersely dismissed appellant's rescission of the settlement as illegal, by holding the confidentiality of its terms "narrowly tailored," and the judgment not against public policy, as follows:

> Plaintiff fails to define any "public interest" which would be abrogated by his agreement to the non-disclosure of the settlement. Similarly, plaintiff's waiver of *his* federal claims was not illegal nor against the public interest.

In the FCA context, "*his* federal" has the transcendental uncertainty of an emphatic oxymoron. What *does* it mean? By exacerbating the uncertainty, the opinion compounds the offense to public policy.[] The opinion fails to recognize that appellant now risks punitive sanctions by filing a FCA suit. In addition, under the enforced terms, any such filing is arguably a material breach, nullifying the entire settlement.

This court omitted the FCA particulars ...

At [CR], plaintiff explained the public interest against nondisclosure: "[A] relator's action *must* commence with *voluntary* service on the government of "substantially all the material evidence and information the person possesses." 31 U.S.C. § 3730 (b)(2) [RC]. [footnote] "Substantially all" necessarily includes the settlement sum, as the footnote elaborated, wherefore the settlement terms on their face preclude compliance with the statutory language.

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whether delayed accrual, equitable tolling, and ongoing violation doctrines may extend it.

The uncontradicted record manifests that the judgment, as a matter of fact, deterred the filing of multimillion dollar FCA suit, beyond the probable pale of its statute of limitations. At [CR], petitioner noted that it is at best unclear as to "whether delayed accrual, equitable tolling, and ongoing violation doctrines may extend" this limit.

On this point, this court omits appellant's authority *U.S. ex rel. Green v. Northrop Corp.* (1995) 59 F.3d 953, cited at [CR]. To this, he adds: *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1303 ("*absolute* privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing"; emphasis added); and Labor Code § 1102.5, which prohibits employer retaliation against an ex-employee who reports a reasonably suspected violation of the law to an enforcement agency.[12]

Another authority shows that the settlement terms are within the compass of these authorities, namely, *Cariveau v. Halferty* (2000) 83 Cal.App.4th 128. In a letter to the court dated September 4, 2000, appellant wrote as follows:

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12 "No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, or violation or noncompliance with a state or federal regulation [or] retaliate against an employee for disclosing [such] information." This is inclusively construed, and applies to ex-employees.

> In the settlement of a suit involving undisclosed regulatory shortfalls, *Cariveau* held that a confidentiality clause was against public policy insofar as it barred voluntary communications to regulators, and that the imposition of such "a restrictive confidentiality clause... is an instance of misconduct in itself." *Id.* [137].

[In retrospect, the court of appeal's "narrowly tailored" standard distinguishes *Cariveau*, wherein the confidentiality clause was global, and encompassed discovery, as in the settlement that petitioner rejected September 11, 1998. The judgment limits confidentiality to the settlement terms.]

F. Opposition To Rehearing

[After repeating their prior points of law, respondents for the first time addressed one of petitioner's federal cases, avoiding one of his prefiling FCA settlement cases:]

The cases appellant cites in support of this argument do not help him. For example, *US. ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir., 1994) involved an FCA action which the plaintiff litigated and then settled for a sum later questioned by the United States as too low - not the barring of the filing of the FCA claim in the first place by virtue of a settlement agreement. Several other [state] authorities cited by appellant work against his argument. [] All of these authorities support, in one way or another, the reassurance provided to appellant by the trial court and affirmed by this court - if the claims you have in mind cannot be waived as a matter of law, then they have not been waived

by this agreement. There is no "illegality" here, and no offense to public policy.

G. Questions Presented To The Supreme Court

[Petitioner summarized his above arguments, in presenting the following two questions:]

Is a 664.6 judgment against public policy if pursuant to a finding that known claims under the federal False Claims Act are waived, except for those that are unwaivable?

Is a 664.6 judgment against public policy if it enforces the secrecy of *any* information of possibly substantial interest to a federal regulatory agency? If not, is such enforced secrecy against public policy where "substantially all" such information must be disclosed as a prerequisite to filing known FCA claims?

## REASONS FOR GRANTING THE WRIT

### 1. The Questions Are Simply And Surely Raised

Especially in light of his pro per status, petitioner deemed it essential to establish that the questions presented are clearly supported by the record, beyond surprise. This he accomplished above, by showing essentially the entire record that gives rise to the questions. On these issues, what you see is what you get. And, as explained above, by virtue of his accepting the court's findings of fact, what you get are the two questions presented, simply and surely raised.

## 2. Whether Courts Can Enforce Terms That Deter *Any* Communication Of Possible Interest To Regulatory Agencies Is An Unsettled Question Of Importance, Which The State Has Decided Contrary To Applicable Federal Law.

(In the following, to help persuade this court that the questions herein qualify for and merit its attention, petitioner incidentally quotes two legal newspaper reports in good faith, mindful that this is not a brief on the merits.)

Settlements, being contracts, are generally matters of state law. But when they involve waivers of federal constitutional or statutory rights, federal law prevails. Mindful of the high percentage of cases that settle; of the last decade's vigorous lobbying against "sunshine" laws by corporations that can generally insist on secrecy in settling with injured individuals; and of the accelerating growth in case volumes; how many federal cases would one expect to contain the text "confidential (or secret) settlement"? The fingers on one hand can count the numbers per district (or per state), and they can count all cases that address the legitimacy of these nondisclosure pacts.

Only one Supreme Court case comes up, *Digital Equipment Corp. v. Desktop Direct* (1994) 511 U.S. 863, 878-880. It decisively holds that the "public policy favoring the voluntary resolution of disputes" is clearly outweighed by "rights originating in the Constitution or statutes," and it disparages the "suggest[ion] that [a statute-based immunity] public policy may be trumped routinely by the expectations or drafting of clever parties." The state court's "unwaived if

unwaivable" addendum to the settlement terms is such a drafting, but it is encompassed by the "operates to deter" language in the questions presented.

The confidentiality question also cuts through linguistic devices by overarching simplicity. The state court found the secrecy "narrowly tailored" enough, which distinguishes *Cariveau, supra.* But do tailoring and balancing tests even apply? Can a settling litigant have *any* legitimate interest in silencing *any* report of potential illegality?

This state evidently takes for granted the legality of secret settlements in cases where people are seriously injured or killed because of product defect or environmental hazard.[13] But the law of the state would seem already to hold such settlement secrecy void, albeit by the lone authority *Cariveau, supra.* How then, can such an enactment be so contentiously fought over -- and lose badly? Is public policy trumped routinely by unabashed expectations?

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13 "California's trial lawyers were dealt a crushing defeat Friday when they had worked feverishly to pass was left to die in the Assembly without so much as a vote. From day one of the session, it was clear that the Consumer Attorney of California was betting everything it had on the passage of SB-11. The bill by Sen. Martha Escutia D-Montebello would have banned secret settlements in cases where people were seriously injured or killed because of product defect or environmental hazard....An identical bill out of the Assembly -- AB 36 -- was also left treading water." *The Recorder* (San Francisco), Sept. 18, 2001

Until it learned of the settlements from a reluctant employee, EEOC found the well below normal contact rate "sinister." Just so, the paucity of secret settlement case law simply shows how well they work. As a matter of fact, their volume has overwhelmed the trial court herein.[14]

### 3. Whether Courts Can Enforce Terms That Generally Deter The Filing Of FCA Claims, Without The Government Being Informed, Is An Unsettled Question Of Importance, Which The State Has Decided Counter To Applicable Federal Law.

*Green, supra* (p.24), held that settlors of state suits could not validly waive prospective "bounty hunter" FCA claims. In contrast, *Nguyen v. City of Cleveland* (2000) 121 F.Supp.2d 643 held that state courts have full jurisdiction to decide "whistleblower" FCA claims.[15]

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[14] "Court administrators ...closed access [to case histories] after computer upgrades turned up inaccurate and confidential information. The upgrades won't be completed for another ten months, and, even then, administrators can't promise access will be restored...Turrone, the P.J., said balancing access and confidentiality issues can be challenging." *The Recorder* (San Francisco), Sept. 19, 2001.

[15] Petitioner respectively refers to 31 U.S.C. § 3730 (b) and (h) as "bounty hunter" and "whistleblower" provisions. Paragraph (b) provides for the recovery of money owed to the government, which the relator shares. Paragraph (h) *directly* makes only the whistleblower whole. However, it too was enacted to benefit public coffers, by its deterrent and enforcement effects.

In *U.S. ex rel. Hall v. Telydyne Wah Chang Albany* (1997) 104 F.3d 230, 233 the *Green* court held that where, "in contrast to Green, the government had full knowledge of the plaintiff's charges and had investigated them before" the parties settled, state settlors *can* validly waive prospective "bounty hunter" FCA claims. In so ruling, the court expressed uncertainty as to whether it should overrule *Green* in light of *United States v. Mezzanato* (1995) 513 U.S. 196, 201-202, where this court held that, "absent clear Congressional intent, courts should presume that statutory provisions may be waived by voluntary agreements.

Petitioner distinguishes *Mezzanato* by the fact that the statute therein provided a wholly private benefit, whereas a decisive test in *Green* and *Hall* was (emphasis added) that the "public interest in the use of the qui tam suits to supplement federal enforcement of the FCA *is not disturbed.*" The state court's express finding of no public interest, because unwaivable claims are not waived, *disturbs* the same interest, because the uncertainty deters qui tam filings. The risk of breaching the terms by filing suit is plain per se, and plainly exacerbated by their less than universal unwaivability. This court should settle the issue.

## CONCLUSION

For the foregoing reasons, Petitioner prays that this court issue a writ of certiorari to review the April 20, 2001 decision of the state of California Court of Appeals, Sixth Appellate District. His wish list includes counsel to represent him in the event of a hearing.

Respectfully submitted,

_____ Date _____

Clifford Johnson,
Petitioner pro se.

## APPENDIX 1: ORAL ORDER GRANTING JUDGMENT

## SUPERIOR COURT, STATE OF CALIFORNIA
## SANTA CLARA COUNTY

No.: CV 742286

Transcript of Court's Statement Of Decision At March 26, 2001 Hearing, granting Defendants motion to enter judgment

I think the material terms of the agreement are not in dispute. Plaintiff agreed to dismiss the case and vacate any and all pending motions, and agreed to provide the release of the claims that he had asserted, and those that were unasserted, that are known or unknown.

And I think that the undisclosed intentions of a party would not be relevant; the parties both manifested an intent to settle the dispute. If there are claims that one cannot waive as a matter of public policy, then they haven't been waived. And that would not, in any way, void the settlement in its entirety. There's a strong public policy favoring settlements. The case is settled. If the qui tam or some other unwaivable claim is out there, then it can be pursued. I'm not going to pass judgment on it.

But I think the motion is well made, the settlement is valid, judgment should be entered in accordance with the terms of the settlement per C.C.P. 664.6, and the Defendant is directed to prepare an appropriate judgment.

# APPENDIX 2: CONFIDENTIAL JUDGMENT (REDACTED)

FILED April 20, 1999

## SUPERIOR COURT OF THE STATE OF CALIFORNIA

## IN AND FOR THE COUNTY OF SANTA CLARA

No. CV742286

## CONFIDENTIAL JUDGMENT

Dept. : 16; Honorable Richard C. Turrone

CLIFFORD JOHNSON, Plaintiff,

v.

The Board of Trustees of the Leland Stanford Junior University, Defendant.

This Court, having on March 26, 1999 granted defendant Stanford University's motion for entry of judgment pursuant to terms of settlement (brought by defendant pursuant to Code of Civil Procedure section 664.6), and having ordered entry of judgment as requested in that motion;

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that judgment in this matter be entered pursuant to the terms of the December 11, 1998 confidential settlement agreement between plaintiff Clifford Johnson ("Johnson") and Defendant Board of Trustees of the Leland Stanford Junior University and each of its departments, schools, related entities, employers, attorneys, predecessors, successors, faculty members or agents of any kind ("Stanford") as follows:

Johnson hereby releases any and all claims,whether asserted or unasserted, known or unknown, which he now or ever has had against Stanford. Johnson further waives the benefits of Section 1542 of the California Civil Code, which states

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of execution of the release, which if known by him must have materially affected his settlement with the debtor.

Stanford agrees to pay Johnson [REDACTED] upon entry of this judgment. Stanford will issue to Johnson a Form 1099 in that amount. Should any governmental agency

determine that any portion of the amount paid to Johnson under this judgment or the underlying settlement is subject to withholding as wages or other compensation, Johnson will indemnify and hold Stanford harmless for any amount that is determined that should have been withheld and paid over to the agency or entity.

Stanford agrees [REDACTED]

Stanford admits no wrongdoing in this action.

Johnson agrees that he will not at any time in the future seek or accept employment with Stanford. However, if Johnson's employer sends Johnson to work on subcontract to Stanford, that would not be deemed to be a violation of this judgment. Johnson agrees that he will not attempt or solicit such assignments, but that if he is assigned by his employer to work at Stanford, then he will not, by the action of his employer, be deemed to have violated the terms of this judgment.

Johnson acknowledges that he has not and that he will not disclose the terms of this judgment unless compelled by legal process to do so, or to the extent necessary to obtain financial advice from a professional advisor or accountant, if any. If asked about the status of the lawsuit, Johnson can say, "It was resolved to the mutual satisfaction of the parties," or "There was a mutually satisfactory settlement. I'm not a liberty to say anything else," but that is all.

Because protecting the confidentiality of the judgment is a material part of the settlement underlying this judgment, a breach of this confidentiality provision will be subject to and will require Johnson to pay Stanford [REDACTED]

Any disputes in the future between the parties arising out of or relating in any way to the settlement underlying this judgment or this judgment will be subject to final and binding arbitration under the rules set forth by the American Arbitration Association.

Each party is to bear its own costs and attorneys' fees.

Hon. Richard C. Turrone, Judge April 20, 1999

## APPENDIX 3: ORDER DENYING NEW TRIAL

FILED May 24, 1999

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

No. CV742286

ORDER DENYING MOTION FOR NEW TRIAL

A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee (CCP section 656). Upon Motion by Defendant per CCP section 664.6 the Court entered judgment pursuant to the terms of a judicially supervised settlement. The Motion For New Trial is denied.

Hon. Richard C. Turrone, Judge May 24, 1999

# APPENDIX 4: COURT OF APPEAL DECISION

FILED April 20, 2001

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

HO20137
Santa Clara County Superior Court No.742286

CLIFFORD JOHNSON, Plaintiff and Appellant,
v.
STANFORD UNIVERSITY, et al., Defendants and Respondents.

Judgment was entered pursuant to Code of Civil Procedure section 664.6. Plaintiff appeals. He claims that (1) the court erred in issuing a discovery order which required him to produce his "work product," (2) the court erred in making a "sanctions finding" against him, (3) the court erred by issuing "sealing" orders, (4) the court erred in entering judgment based on Code of Civil Procedure section 664.6 and (5) the court erred in denying his new trial motion. We affirm.

## Background

The lawsuit at issue here is an action initiated by plaintiff in 1994 against defendants for wrongful tem1inatjon and related causes of action. Originally, defendants' summary judgment motion was granted on the ground that plaintiff had waived his right to bring a civil action by submitting his claims to "final and binding" arbitration. Plaintiff appealed, and this court reversed because there were triable issues of material fact underlying defendants' waiver defense.

After remand, plaintiff filed a second amended complaint containing seven contract and tort causes of action for wrongful teffi1ination, defamation and fraud. Defendants' demurrer was sustained without leave to amend as to all of the causes of action except that the demurrer was sustained with leave to amend as to a fraud cause of action. Plaintiff subsequently filed a third amended complaint containing nine causes of action. One of these causes of action had previously been the subject of a sustained demurrer without leave to amend. Defendants demurred to seven of the causes of action. They did not demur to two contract causes of action. The court sustained the demurrer without leave to amend as to five of the causes of action. The demurrer was overruled as to a fraud cause of action. The court overruled the demurrer as to one defendant on a trade libel cause of action and sustained the demurrer with leave to amend as to two other

defendants on that cause of action. Plaintiff s motion for reconsideration of this ruling was denied.

Defendants thereafter demurred again to the trade libel cause of action. The court sustained the demurrer with leave to amend. Plaintiff thereafter filed a fourth amended complaint containing but two causes of action: one for wrongful termination in breach of contract and the other for fraud. Defendants again demurred. They also sought sanctions under Code of Civil Procedure section 128.5 on the ground that plaintiffs fourth amended complaint violated the court's prior rulings on the demurrers. The court elected to treat the demurrer as a motion to strike, and it struck the fourth amended complaint as exceeding the scope of the court's prior ruling on the demurrer. It denied defendants' request for sanctions.

Hence, the operative pleading at that point was the third amended complaint containing two contract causes of action and one fraud cause of action. Defendants answered this complaint by admitting some allegations, denying others and raising numerous affirmative defenses. Plaintiffs subsequent motion for leave to file the fourth amended complaint was denied.

By October 1, 1998, the parties had undergone an unsuccessful mediation session that had lasted a full day. The court set a trial date of February 22, 1999. By stipulation of

the parties, the court subsequently continued the trial date to pern1it the court time to try to settle the matter. On November 16, 1998, defendants brought a motion to compel responses to their document production requests. Plaintiff, who had never been represented by an attorney in these proceedings, had refused to provide the documents on the ground that these documents were protected "attorney work product." In the morning on December 11, 1998, the court ruled that "you [plaintiff] do not have a work product privilege" and granted defendants' motion to compel.

Late in the afternoon on December 11,1998, the parties recited a settlement agreement on the record before the court. First, defendants' trial counsel stated the tern1s of the agreement.[16] These terms included, among other things, the following. "Plaintiff, Mr. Johnson, hereby releases any and all claims whether asserted or unasserted, known or unknown which he now or ever has had against the releasees. [¶] Mr. Johnson further waives the benefits of Section 1542 of the California Civil Code [thereby releasing even unknown claims] in exchange for this release." "Mr. Johnson acknowledges that he has not and agrees that he will not

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[16] A transcript containing most of the terms of the settlement agreement is included in the unsealed appellant's appendix which constitutes the record before us. This transcript does not contain some of the confidential terms, apparently including the sum of money paid by defendants to plaintiff.

disclose the existence or terms of this settlement unless compelled by legal process to do so. . . ." "[H]e's going to agree to dismiss the case and the Court would vacate any and all pending motions." Discovery would "all come to a stop." The lawsuit would be dismissed with prejudice within three days after receipt of the agreed payment.

After the full terms of the agreement were recited on the record (in part by defendants' trial counsel and in part by the judge), the court asked plaintiff "Mr. Johnson, does that fully state your understanding?" Plaintiff responded "Yes. [¶] There is one verbal nuance. In the confidentiality it was said that I would be – I would remain confidential as to the existence and terms of the agreement. The existence of a settlement cannot be --" The court interrupted and clarified that plaintiff would not violate the agreement by telling someone that there had been "a mutually satisfactory settlement" of the action. Plaintiff agreed to this term. This colloquy then occurred. "THE COURT: You heard the terms, Mr. Johnson. Do you understand them? [¶] MR. JOHNSON: Yes. [¶] THE COURT: Do you agree to be bound by them? [¶] MR. JOHNSON: Yes." Defendants also expressed their agreement to the terms of the settlement on the record. The court closed out the hearing by stating "[t]he Court will declare it a judicially supervised settlement [and] put a stamp of approval on it."

Less than three weeks later, plaintiff wrote a letter to defendants in which he asserted that a potential "qui tam action" against defendants was not foreclosed by the settlement.

On March 8, 1999, defendants applied for an order sealing the reporter's transcript of the confidential settlement. The stated ground for sealing the transcript was that the parties had agreed that the terms of the agreement would be confidential. A sealing order was necessary because defendants wished to attach a copy of the transcript under seal to their motion to enforce the settlement agreement. The court immediately issued an order sealing the transcript.

On March 11, 1999, defendants filed a motion for entry of judgment pursuant to the terms of the settlement under Code of Civil Procedure section 664.6. On March 11, 1999, at defendants' request, the court stayed all proceedings, including discovery, pending the court's decision on defendants, motion to enforce the settlement agreement. Plaintiff opposed defendants' motion for entry of judgment. He claimed that the settlement agreement did not preclude him from pursuing "federal claims" because the agreement did not specifically reference such claims. He also asserted that a "qui tam action" could not be foreclosed by the settlement agreement because such claims were unwaivable since the federal government was the real party in interest. Defendants pointed out that the fact that the agreement could not waive any claims that were unwaivable as a matter of public policy did not go to the validity of the agreement but only to its scope.

The court found that the material terms of the agreement were undisputed, and it agreed with defendants that the existence of unwaivable claims "would not, in any way, void the settlement in its entirety." The court ruled that the settlement was valid and ordered the entry of judgment pursuant to Code of Civil Procedure section 664.6. On April 20, 1999, the court entered a "Confidential Judgment" pursuant to the terms of the settlement agreement. As the settlement agreement provided that the terms of the settlement would be confidential, the court also entered an order sealing the judgment.

On May 10,1999, plaintiff filed a motion for a new trial. On May 24, 1999, the court denied the motion. On June 9, 1999, plaintiff filed a notice of appeal from the court's December 11, 1999 ruling granting defendants' motion to compel discovery of items that plaintiff had argued were protected by his "work product privilege." On June 22, 1999, plaintiff filed a notice of appeal from the Confidential Judgment which itemized challenges to numerous prior orders including the court's sealing orders and its denial of his new trial motion.

## Discussion

### I. Purported Appeal From Discovery Order

In what he claims is a separate appeal independent of his appeal from the judgment, plaintiff purports to challenge the court's discovery order rejecting his "work product privilege" claim.

It is "firmly established" that discovery orders are not appealable, but are reviewable on appeal from a final judgment. (*Southern Pacific Co. v. Oppenheimer* (1960) 54 Cal.2d 784,786.) Plaintiff suggests that his appeal is somehow not from "a discovery order" but instead from the court's "ruling that he has no work product privilege." This does not further his argument in the least. Plaintiffs post-hoc re characterization of the order does not change its nature and, regardless, would not make it appealable. (Code Civ. Proc., § 904.1.) The order plaintiff purports to appeal from both is and was a discovery order. Thus, it is readily apparent that plaintiffs purported appeal from this order must be dismissed.

There is no need for further discussion of this issue. The court's discovery order was in force for but a few hours on December 11, 1998 before all discovery was terminated by the settlement. Nothing in the record suggests that the order was enforced during its extremely brief life.

Plaintiff does not urge that an error in the court's discovery order could somehow merit reversal of the judgment. Instead, he seems to suggest that the court's discovery order ruling that he had no work product privilege might have some ancillary impact "in further proceedings." All that is before us is an appeal from the judgment. Any opinion we might express on the validity of the court's discovery ruling would be irrelevant to that judgment, and we lack the power to issue such an advisory opinion. (*People Ex Rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910,912; see also Bishop v. Merging Capital, Inc. (1996) 49 Cal.App.4th 1803,1808.)

## II. Appeal From Judgment

Plaintiff challenges not just the judgment and the denial of his motion for a new trial but also purports to challenge the court's sealing orders and what he calls the court's "sanctions finding" under Code of Civil Procedure section 128.5.

### A. Sanctions

Plaintiff purports to challenge the court order denying defendants' request that plaintiff be sanctioned. After plaintiff filed a fourth amended complaint, defendants demurred and sought sanctions under Code of Civil Procedure section 128.5 on the ground that plaintiffs filing violated the court's

prior rulings on the demurrer to the third amended complaint. The court elected to treat the demurrer as a motion to strike, and it struck the fourth amended complaint as exceeding the scope of the court's prior grant of leave to amend. It denied defendants' request for sanctions.

Plaintiff argues that this order contained a "finding of sanctionable conduct" which might somehow have some detrimental impact on him in the future. While a sanctions order may be reviewed on an appeal from a final judgment (Code Civ. Proc., • 904.1, subd. (b)), plaintiff has pointed to nothing in the record which supports his implicit contention that he is aggrieved by the court's denial of defendants' request that he be sanctioned.

"Any party aggrieved may appeal. . . ." (Code Civ. Proc., • 902.) "One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. Appellant's interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730,737, citations and quotation marks omitted; see also *Adams v. Woods* (1857) 8 Cal. 306,315.)

The court stated that plaintiff s conduct had violated its orders but was not deserving of sanctions. Its only order on this matter was a denial of defendants' request for

sanctions. The record before us does not contain any support for a conclusion that there is any immediate, pecuniary and substantial injurious consequence to plaintiff from the court's order denying sanctions or its statement that plaintiff had violated its orders. We cannot conceive of any future impact on plaintiff which is neither nominal nor remote. Plaintiff was not required to pay sanctions, and the court apparently was not convinced that he had acted with an improper motive. In addition, since plaintiffs conduct plainly violated the court's orders, the court's finding was not an abuse of discretion. (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992,1001.)

**B. Sealing Orders**

Plaintiff challenges the court's orders sealing both the reporter's transcript of the confidential settlement's terms and the judgment incorporating those terms.

Plaintiff relies heavily on the California Supreme Court's July 1999 decision in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 (*NBC*). The California Supreme Court held in NBC that civil proceedings are presumptively open and that two prerequisites must be satisfied before such proceedings are closed or sealed. First, "a trial court must provide notice to the public of the contemplated closure. . . . [A]dequate notice is provided by publicly docketing the motion [for closure or sealing] reasonably in advance of a determination thereon. . . . [¶] Second, before substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a

hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra*, 20 Cal.4th 1178,1217-1218.) The court recognized that enforcement of a binding contractual confidentiality obligation was an "overriding interest" which would justify sealing. (*NBC* at p. 1222, fn. 46.)

Both of the trial court ' s sealing orders occurred before the California Supreme Court issued its decision in NBC. This may explain why the trial court did not comply with all of the procedural requirements set forth therein. Nevertheless, plaintiff cannot claim to be aggrieved by the court's sealing orders since he agreed, as part of the settlement agreement, that the settlement agreement would be confidential and that he would not disclose its terms to anyone.

Nor would a noticed hearing and express findings have failed to result in sealing orders. Plaintiff concedes that the parties' contractual nondisclosure obligations were an overriding interest. This interest obviously would have been prejudiced by disclosure. Sealing the terms of the settlement

was clearly the least restrictive means available to ensure the confidentiality of the settlement terms, and the sealing was narrowly tailored so as to seal only the terms of the settlement. There is no indication anywhere in the record before us that anyone other than plaintiff ever expressed any interest in these proceedings and would have opposed sealing if only a noticed hearing had been provided. A noticed hearing and express findings would have produced the same sealing orders.

### C. The Judgment

"If parties to pending litigation stipulate. . . orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." (Code Civ. Proc., § 664.6.) "When ruling on a section 664.6 motion, the court in effect acts as a trier of fact. [T]he trial court must determine whether the parties .entered into a valid and binding settlement of all or part of the case. In making this determination, trial judges, in the sound exercise of their discretion, may receive oral testimony or may determine the motion upon declarations alone. [¶] The proper standard of review, therefore, is whether the trial court's ruling was supported by substantial evidence." (*Fiore v. Alvord* (1985) 182 Cal.App.3d 561, 565, citation, quotation marks and emphasis omitted.)

"A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to

settlement contracts. An essential element of any contract is 'consent.' The 'consent' must be 'mutual.' Consent is not mutual, unless the parties all agree upon the same thing in the same sense. [¶] The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe. . . . The parties' outward manifestations must show that the parties all agreed upon the same thing in the same sense. If there is no evidence establishing a manifestation of assent to the same thing by both parties, then there is no mutual consent to contract and no contract formation." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793,810-811, citations and quotation marks omitted.)

Plaintiff first claims that the settlement "Does Not Meet Statutory Requirements" because the court did not have the parties "before the court" as required by the statute. Not so. The record unambiguously reflects that plaintiff and defendants' authorized representative were "before the court" when the settlement terms were placed on the record and the parties expressed their agreement to these terms. The court's implicit determination that the parties were "before the court" at that time is supported by substantial evidence.

Plaintiff argues that the court could not enter judgment on the settlement without implicitly finding both that he had waived any waivable federal claims and that he

could not have reasonably understood that federal claims were excluded from the settlement's terms. He urges that substantial evidence does not support these alleged implicit findings. Plaintiff misconceives the court's role. It was required to decide whether the parties had outwardly manifested their consent to the settlement terms. The record reflects that plaintiff expressly stated that he understood and agreed to the terms of the settlement that had been stated on the record before the court. One term was that plaintiff waived ***all*** claims against defendants. As the court noted, if a claim was not waivable, this settlement term would not result in waiver of that claim. Plaintiffs subjective understanding of whether or not he had given up his federal claims was irrelevant because he had outwardly manifested an intent to waive all claims. This outward manifestation amply supported the court's finding that the parties had agreed to the settlement terms.

Plaintiff contends that reversal is required because the court erroneously failed to credit his extrinsic evidence regarding his pre-settlement and post-settlement desire to avoid waiving any federal claims. This contention is apparently based on the court's failure to specifically mention plaintiffs extrinsic evidence and its statement that "the undisclosed intentions of a party would not be relevant." As we have already explained, the court properly found that the parties had outwardly manifested assent to the settlement terms. Plaintiffs subjective desire to avoid waiving federal claims was irrelevant. The court did not err in rejecting extrinsic evidence of plaintiffs unexpressed desires.

Plaintiff maintains that the judgment was invalid even if he validly agreed to its terms because he was entitled to subsequently rescind it "for illegality of consideration, and as against the public interest." The only "illegality" he mentions is his allegation that the judgment impaired his First Amendment right to freedom of speech and his alleged right to bring a federal action. First Amendment rights may be waived if the relinquishment is clear, knowing and compelling. (*Fallout v. Hampshire* (1999) 74 Cal.App.4th 1394, 1400; *City of Glendale v. George* (1989) 208 Cal.App.3d 1394, 1398.) Here, the record clearly and compellingly reflects that plaintiff was aware of and understood the terms of the settlement agreement regarding his nondisclosure obligation. His colloquy with the court about a "verbal nuance" in the nondisclosure obligation demonstrates both his awareness and his understanding of that obligation. His unambiguous consent to the settlement established that he agreed to the nondisclosure obligation. No "illegality" was involved in plaintiff's knowing and voluntary agreement to the nondisclosure obligation contained in the settlement. Plaintiff fails to define any "public interest" which would be abrogated by his agreement to the nondisclosure term of the settlement. Similarly, plaintiff's waiver of his federal claims was not illegal nor against the public interest.

The court's entry of judgment on the settlement agreement was supported by substantial evidence.

## D. Denial of New Trial Motion

Plaintiff contests the court's denial of his motion for a new trial. Plaintiff claims that the court incorrectly concluded that a new trial motion was inappropriate because there had not been a trial. He also asserts error in the court's failure to reweigh the evidence under a "clear and convincing evidence" standard in response to his motion.

The court denied plaintiffs new trial motion in a minute order which read, in full: "A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury, court or referee (CCP section 656). Upon Motion by Defendant per CCP section 664.6 the Court entered Judgment pursuant to the terms of a judicially supervised settlement. The Motion For New Trial is denied."

Plaintiff concludes from this brief order that the court erroneously failed to consider the merits of his new trial motion. " A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Indulging all presumptions in favor of the validity of the court's order, we cannot concur in plaintiffs assumption that the trial court erred. The first sentence of the court's order is an accurate quotation of the text of Code of Civil Procedure section 656. The second sentence of the order is an accurate statement of the

procedure by which the judgment was obtained. The third sentence states that plaintiffs motion is denied. Nowhere in the order did the court state that it was refusing to consider the merits of the motion. Therefore, we must presume that the court applied the appropriate standards and denied the motion on its merits. As plaintiff raises no other challenge to the court's ruling on the motion which is independent of his challenges to the judgment itself, we can find no basis for disturbing the court's ruling on his new trial motion.

**Conclusion**

The judgment is affirmed. The purported appeal from the court's December 1998 discovery order is dismissed.

Mihara, J.

WE CONCUR: Premo, Acting P.J. Elia, J.

# APPENDIX 5: DENIAL OF PETITION FOR REHEARING

FILED May 15, 2001

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

HO20137
Santa Clara County Superior Court No.742286

CLIFFORD JOHNSON, Plaintiff and Appellant,
v.
BOARD OF TRUSTEES, et al., Defendants and Respondents.

BY THE COURT:*

Appellant's petition for rehearing is denied.

Dated May 15, 2001 PREMO, J.

* Before Premo, Acting P.J., Elia, J. and Mihara, J.

# APPENDIX 6: ORDER OF SUPREME COURT

FILED July 11, 2001

Court Of Appeal, Sixth Appellate District - No. H020137

IN THE SUPREME COURT OF CALIFORNIA
En Banc

HO20137
Santa Clara County Superior Court No.742286

CLIFFORD JOHNSON, Plaintiff and Appellant,
v.
STANFORD UNIVERSITY, et al., Defendants and Respondents.

Petition for review DENIED

Werdeger J., was absent and did not participate

GEORGE

Chief Justice

## APPENDIX 7: INVOLVED FCA PROVISIONS

**Section 3730. Civil actions for false claims.**

**(b) Actions by Private Persons.** - (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

...

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall(A) proceed with the action, in which case the action shall be conducted by the Government; or(B) notify the court that it declines to take over the action,in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

**(c) Rights of the Parties to Qui Tam Actions.** - (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion. (B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera....

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.

...

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy

available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

**(d) Award to Qui Tam Plaintiff.** - (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information(other than information provided by the person bringing the action)relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

**(e) Certain Actions Barred.** - ... (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government

before filing an action under this section which is based on the information.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

**Section 3731. False claims procedure.**

(b) A civil action under section 3730 may not be brought(1) more than 6 years after the date on which the violation of section 3729 is committed, or(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

FEB 8 2002

CLERK

No. 01-625

IN THE

# Supreme Court of the United States

CLIFFORD J. JOHNSON,

*Petitioner,*

*v.*

THE BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY, CEDRIC BENNETT, JOHN SACK and ROBERT STREET,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT**

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## INTRODUCTION

This petition for certiorari should be denied because it presents no federal question, let alone a question of such transcendent and immediate national importance as to warrant intervention by this Court. This is a fact-bound case that turns upon California state law issues — the evidentiary standards for the judicial confirmation of settlements — which this Court lacks jurisdiction to review. In essence, petitioner impermissibly asks this Court to reweigh the record and issue an advisory opinion as to whether the settlement may impinge upon unexercised rights in hypothetical situations. That is not the function of this Court under our system of federalism.

## STATEMENT OF JURISDICTION

This court has no jurisdictional authority to grant this petition under 28 U.S.C. section 1257(a). The opinion for which review is sought does not question the validity of a statute or treaty of the United States, does not draw the validity of a state statute into question on the ground of repugnancy to the Constitution, treaties or laws of the United States and, as it was based entirely on state law, does not raise a federal question. This is discussed further on page 7, "Reasons for Denying the Writ."

## STATEMENT OF THE CASE

This appeal arose from petitioner Clifford Johnson's anger at not being able to renege on a negotiated settlement of all of his claims against his former employer, respondent Stanford University, and then to receive an additional $25,000 to settle his federal claims. When Stanford refused this demand and successfully moved for entry of judgment on

the settlement, petitioner appealed numerous rulings, lost on all issues, lost on his demand for rehearing and lost on his petition for review by the California Supreme Court. Now he seeks certiorari.

Petitioner's wrongful termination action against Stanford was settled in a court-supervised conference on December 11, 1998. (Petition, Appendix 4, pp. 39-40.) At the court's suggestion, the parties put the terms of the settlement on the record, including the following:

> Plaintiff, Mr. Johnson, hereby releases any and all claims whether asserted or unasserted, known or unknown, which he now or ever has against the releasees.
>
> Mr. Johnson further waives the benefits of section 1542 of the California Civil Code in exchange for this release.

(Petn., App. 4, p. 40.)

The court repeatedly confirmed Mr. Johnson's approval of the settlement terms, including the provision that the terms of the agreement be kept confidential. The court asked him, "Mr. Johnson, does that fully state your understanding?" Johnson answered, "Yes," and then asked a question about a nuance of the confidentiality provision. After a discussion of that point, Johnson said, "Agreed." (Petn., App. 4, p. 41.) The court then questioned Johnson for a second time, as follows:

THE COURT: You heard the terms, Mr. Johnson. Do you understand them?

MR. JOHNSON: Yes.

THE COURT: Do you agree to be bound by them?

MR. JOHNSON: Yes.

(*Ibid.*) After obtaining the same assurances from Stanford, the court declared the agreement to be a "judicially supervised settlement" with the court's "stamp of approval" on it. (*Ibid.*)

Approximately two weeks later, Johnson wrote to counsel for Stanford, recited a few of his grievances, announced that he had drafted a complaint against Stanford for violation of the federal False Claims Act ("FCA"), 31 U.S.C. section 3730, and for retaliation, and demanded an extra payment to prevent him from filing the complaint and what he himself called "further and further-fetched litigation." (Petn., App. 4, p. 41, and see Appendix to Appeal, Vol. IX, 2158-2159, especially 2157, n.4. Hereafter, the record will be referred to by volume and page numbers.)

Stanford refused to pay any additional money and pointed out that the settlement agreement released Johnson's rights to bring additional claims, expressly including any sort of retaliation claim against Stanford. (Vol. IX, 2142-2143.) Stanford then moved to confirm the settlement and for entry of judgment. (Petn., App. 4, p. 42.)

In response, Johnson submitted his own sworn declaration, asserting under penalty of perjury that he had *never* intended to release *all* claims against Stanford – which was precisely what he assured the court, on the record, that he was agreeing to do – but that he had planned for weeks to

settle only the state claims and then later demand an additional $50,000 (although he was willing to accept $25,000) to drop the federal claims. (Vol. IX, 2196:3-11; 2190:23-25; 2191:13-21; 2193:14-17.)

In this amazing declaration, in which Johnson asserts that he had absolutely no intention of releasing his federal claims, he stated:

> . . . [G]iven that I was seeking only a further $25,000 monetary satisfaction, I hoped that I need do no more than draft a federal claims complaint, using my already drawn allegations of multi-million dollar federal claims act violations. A threat to file the draft should suffice to conclude the settlement. . . .

(Vol. IX, 2195:1-6; 2195:12-13.)

In opposing the motion to confirm, Johnson essentially argued that his "undisclosed intent" not to settle any federal claims *while falsely attesting to the court that he was releasing "any and all claims"* justified rescission of the settlement agreement on the grounds of "no mutuality." (*See, e.g.*, Vol. IX, 2167:2-6.) He also argued that the release of "any and all claims" could not have included any FCA claims because some of them are nonwaivable as a matter of law (Vol. IX, 2257:12-25), overlooking the fact that he, himself, had been attempting a few days earlier to release those same FCA claims for $25,000, as set forth above.

The court did not accept any of these arguments as a basis for rescission and confirmed the settlement, as follows:

> . . . I think the material terms of the settlement are not in dispute. [Johnson] agreed to dismiss the case . . . and agreed to provide the release of the claims that he had asserted, and those that were unasserted, that are known or unknown.
>
> And I think the undisclosed intentions of a party would not be relevant; the parties both manifested an intent to settle this dispute. If there are claims that one cannot waive as a matter of public policy, then they have not been waived. And that would not, in any way, void this settlement in its entirety.
>
> There's a strong public policy to settle cases. The case is settled. If the qui tam or some other unwaivable claim is out there then it can be pursued. I'm not going to pass judgment on it.

(Petn., App. 1, p. 30.) Judgment was then entered on the terms of the settlement pursuant to Code of Civil Procedure section 664.6. (Petn., App. 1, p. 31.) Johnson's motion for new trial was denied, as was his motion to set aside that denial. (Petn., App. 4, p. 43.)

Petitioner then appealed to the Sixth Appellate District, which affirmed the judgment. (Petn., App. 4.) Beginning its analysis by noting that the "proper standard of review, . . . is whether the trial court's ruling was supported by substantial evidence," the court reviewed the voluminous record and found that it "clearly and compellingly reflects that [petitioner] was aware of and understood the terms of the settlement agreement," and that he had given his "unambiguous consent" to the settlement and to the

confidentiality provisions. (Petn., App. 4, p. 52.) In response to petitioner's argument that he had not "understood" that federal claims as well as state claims were being released, the court explained again the requirements for entry of judgment under section 664.6, as follows:

> [Petitioner] misconceives the court's role. It was required to decide whether the parties had outwardly manifested their consent to the settlement terms. The record reflects that [petitioner] expressly stated that he understood and agreed to the terms of the settlement that had been stated on the record before the court. One term was that [petitioner] waived *all* claims against defendants. As the court noted, is a claim was not waivable, this settlement term would not result in waiver of that claim. [Petitoner's] subjective understanding of whether or not he given up his federal claims was irrelevant because he had outwardly manifested an intent to waive all claims. This outward manifestation amply supported the court's finding that the parties had agreed to the settlement terms.

(Petn., App. 4, p. 51.) Similarly, the court found that "No 'illegality' was involved in [petitioner's] knowing and voluntary agreement to the nondisclosure obligation. . . ." (Petn., App. 4, p. 52.) The court's conclusion on this point, and the basis for its affirmation, was plain and simple: "The court's entry of judgment on the settlement agreement was supported by substantial evidence." (*Ibid.*)

After unsuccessfully seeking rehearing from the court of appeal (Petn., App. 5), petitioner sought review by the California Supreme Court. The petition for review was denied summarily. (Petn., App. 6.) This petition for certiorari followed.

## REASONS FOR DENYING THE WRIT

### A. This Court Does Not Have Jurisdiction To Hear this Matter

The jurisdiction of the Supreme Court to review decisions of the state courts is codified at 28 U.S.C. section 1257, which provides that final judgments rendered by the highest court of a state in which a decision could be had may only be reviewed in three situations:

> (1) where the validity of a treaty or statute of the United States is drawn in question;
>
> (2) where the validity of a statute of any state is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, or
>
> (3) where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a). A glance at petitioner's "Questions Presented" shows that none of these applies here. There is no question as to the validity of a treaty or a statute, federal or state, and no federal question is raised.

The ruling which petitioner challenged in the lower courts and now attempts to challenge here is an order made pursuant to California Code of Civil Procedure section 664.6, which sets forth the evidentiary and procedural bases a court must find before entering judgment on a settlement. The standard set by this statute is substantial, objective evidence of understanding and mutual consent. *Fiore v. Alvord* (1985) 182 Cal. App.3d 561, 565; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal. App. 4th 793, 810-11.

Both the trial court and the intermediate court of appeal found this standard had been amply met. (Petn., App. 1, p. 30; App. 4, pp. 49-52.) That was it. No federal question arose from the determination as to whether there had been a sufficient showing of objective evidence of consent.

As to petitioner's allegations about the hypothetical future "deterrence" of FCA claims and reporting, no provisions referring to such claims were included in the courts' orders. If these vague concerns about hypothetical future problems are petitioner's notion of a "federal question" sufficient to trigger this Court's jurisdiction, he is mistaken. These alleged concerns did not shape either lower court's determination as to whether judgment should be entered. If anything, they were seen as non-issues — as set forth above, both courts assured petitioner that non-waivable claims cannot be waived, the superior court stated that any limitation on the filing of future actions would go to the scope of the agreement underlying the judgment, not its validity, and the settlement agreement itself provided that the confidential terms could be made available (as to an interested government agency) through legal process. (Petn., App. 1, p. 30; App. 2, p. 34; App 4., pp. 51.)

The sole determinant in the decision was whether the evidence met the evidentiary standards for confirmation of settlement and entry of judgment under a California statute. As no federal question was both raised and decided in the state court below, this Court is without jurisdiction to review this matter. *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S. Ct. 1161, 1162-63 (1969), citing *Crowell v. Randell*, 10 Pet. 368, 391, 9 L. Ed. 458 (1836). Even if a federal question of some sort had also been decided, which is denied, the California statutory ground would still suffice as an independent and adequate basis for the decision, and this Court would be without jurisdiction. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S. Ct. 183, 184 (1935). This petition should be denied.

### B. Neither the Record nor the Decisions Below Raises the Questions Presented by the Petition

The first of petitioner's "Questions Presented" is "*If*, to enforce a private contract, a (state) court issues an order that operates to deter the filing of prospective claims under the False Claims Act, without the government having been informed, is the order void as against public policy?" (Petn., p. i, emphasis added.) Significantly, petitioner does *not* seek review of a dismissal by any court of any such claim on the ground that he waived the right to bring such a claim when he settled his employment dispute. In fact, petitioner has never filed any such claim.

Moreover, as to petitioner, this question is moot. The only allegations he has threatened to raise in an FCA claim describe events occurring between 1984 and 1992 and have long been time-barred, as the FCA statute of limitations is six years from the alleged violation or three years from notice. 31 U.S.C. § 3731(b). (Vol. VII, 1753-1758.)

His second question is similar: "*If*, to enforce a private contract, a (state) court issues an order that operates to deter the reporting of any information that might be of interest to federal regulatory agencies, is the order void as against public policy?" (Petn., p. i., emphasis added.) Once again, petitioner does *not* seek review of a ruling of any court which has prohibited him from communicating with a government official (or anyone else) on the ground that he released that right in the same settlement. In fact, no such injunction has ever been sought by respondent or rendered against petitioner.

As his first purported "reason" why his petition should be granted, petitioner argues that these two questions are "simply and surely raised" because, in his words, "what you see is what you get." (Petn., p. 24.) What we see and what we get here is nothing more than a request for an advisory opinion from this court as to whether such rulings might be void as against public policy in the event that some court, some day, might issue them against someone under unknown circumstances. Offering speculative advisory opinions about hypothetical unfiled lawsuits and unissued rulings is not the business of this court. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 101, 118 S. Ct. 1003, 1016 (1998); *Hayburn's Case*, 2 Dall. 408, 1 L. Ed. 436 (1792).

### C. The State Has Not Decided Issues of Confidentiality Contrary to Applicable Federal Law

As his second purported reason why the petition should be granted, petitioner contends that the issue of whether courts can enforce terms that deter communications of possible interest to regulatory agencies is "an unsettled question of importance" and that "the state," presumably the

State of California, has decided this question contrary to applicable federal law.

Once again, the hypothetical nature of the inquiry is clear. Petitioner does not claim, and the facts certainly do not demonstrate, that any lower court has ever "enforced terms" which prevented him from speaking to a governmental agency because of the settlement of his employment dispute with Stanford. *If this issue is of interest to this court, this is not the vehicle for its consideration.*

Petitioner's purported concern about mythical gag orders apparently arises from the fact that the settlement agreement at issue here – between a private individual and a private university, not involving a matter of public security or public interest – contained a confidentiality provision as to certain terms. (Petn., App. 2.) There are two significant facts about this provision of the agreement.

First, petitioner never objected in the trial court to holding certain terms confidential (not even when he discussed a nuance of the provision with the court before agreeing to it on the record), nor did he object to entry of two sealing orders which help protect that confidentiality. (Vol. IX, 2109:23-2110:2; 2181:25-17, 2255:14-17; 2276.) The court of appeal specifically noted his knowing consent, on the record, to the confidentiality provision. (Petn., App. 4, p. 52.) This inaction below constitutes a waiver of any right of appeal. "It is the universal rule that a judgment or order will not be disturbed on appeal prosecuted by a party who has expressly consented to the making thereof." *Hibernia Savings & Loan Society v. Waymire* (1907) 152 Cal. 286, 287 (citing cases dating as far back as 1856), *accord*, Cal. Civ. Code § 3515 ("He who consents to an act is not wronged by it.").

Secondly, the confidentiality provision applies only to the *terms of the settlement itself* and expressly allows petitioner to disclose the terms if "compelled by legal process to do so." (Petn., App. 2, p. 34.) Why any federal regulatory agency would be interested in the details of the few terms held confidential in this settlement of this private employment dispute – *a dispute in which no FCA claims were litigated* – is unimaginable, but if the government ever became interested, it would be able to obtain whatever information it wanted. As the Sixth Appellate District noted in its opinion in this matter, the sealing of these terms was "narrowly tailored," and was "clearly the least restrictive means available to ensure the confidentiality." (Petn., App. 4, p. 49.) The court also noted that "[Petitioner] fails to define any 'public interest' which would be abrogated by his agreement to the nondisclosure term. . . ." (Petn., App. 4, p. 52.)

Further, petitioner has not cited any cases showing a conflict between the holdings of California courts and federal courts on this issue. The only authorities cited by petitioner in support of this purported "reason" for granting review are two newspaper articles full of hearsay and editorializing, his own opinion about what "this state evidently takes for granted" in personal injury litigation, and two cases, *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1192 (1994) and *Cariveau v. Halferty* (2000) 83 Cal. App. 4th 126.

Petitioner's reference to *Digital Equipment* is pointless. *Digital Equipment* did not "decisively hold," as petitioner incorrectly claims at page 25, that certain rights outweigh policy interests in the voluntary resolution of disputes. Instead, the entire opinion dealt with one of the fine points

of appellate procedure, the "finality" requirement for appeals of right under 28 U.S.C. section 1291 as applied to collateral orders, and its only holding was as follows: "We hold that an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders." *Id.*, 511 U.S. at 865, 114 S. Ct. at 1994.

*Cariveau, supra*, is equally irrelevant. The case had nothing to do with an agreement to keep the *terms of a settlement* confidential, but instead struck down a specific "forebearance agreement" which explicitly forbade a defrauded client from disclosing a stockbroker's *misconduct* to any law enforcement or regulatory agency in stark violation of the broker's duties to her settling client as well as to her employer and her professional licensing and regulatory boards. No such provision was included in the settlement agreement at issue here.

Petitioner has not shown that any court has enforced the narrowly tailored provision at issue to prevent him from speaking to anyone, or that any California court has issued a single ruling which conflicts with the holdings of federal courts on questions of confidential settlements.

### D. This State Has Not Taken a Position Contrary to Federal Law on Waivers of FCA Claims

As his third and final purported "reason" why the petition should be granted, petitioner claims that "whether courts can enforce terms that generally deter the filing of FCA claims, without the government being informed, is an unsettled question of importance, which the state has decided counter to applicable federal law." (Petn., p. 27.) Again, petitioner's argument is pointless: no court has halted petitioner's filing

of such an action, there is nothing "unsettled" about whether such deterrence is permissible, and not a single California decision conflicting with federal decisions on point is cited.

Both the superior court and the court of appeal advised petitioner – who argued that FCA claims are nonwaivable as a matter of law – that if a claim is nonwaivable, this settlement would not waive that claim. (Petn., App. 1, p. 30; App. 4, p. 51.) The applicable case authorities fully support the actions of these two courts. *See, e.g., Town of Newton v. Rummery*, 480 U.S. 386, 391, 107 S. Ct. 1187, 1191 (1987). Not only did the courts in *this* matter fully comport with federal law on this point, petitioner does not cite *any* conflicting California authority. In fact, he does not even cite any *California state* authorities at all.

Petitioner relies on four authorities, one from a federal court in California and three from elsewhere, to support his notion that California courts are both wrong on the waivability of FCA claims and in conflict with federal courts on that issue. The California case is *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995), which, as petitioner correctly notes, found that a prefiling release of a *qui tam* claim under the FCA, when entered into without the consent or knowledge of the United States, cannot act as a bar to the subsequent filing of that *qui tam* claim. *Id.* at 969.

Petitioner's next case is a Ninth Circuit decision from Washington state, *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997), that leads to a different result, but relies upon *Green* and is thoroughly consistent with it. There is no conflict here and petitioner's claim that the *Hall* court considered "overruling" *Green* is

simply false. (Petn., 28.) *Green* and *Hall both* based their decisions on an analysis of the public interests underlying the FCA *qui tam* provisions, and the critical importance of the government's knowledge of the allegations being made in such claims. In *Green*, where the government had never been advised of the yet-unfiled claim, the court would not allow it to be waived by the settlement of other claims; in *Hall*, where the government was well informed about the claim, had investigated the matter and declined to proceed, the court concluded that the public interest in the use of *qui tam* suits to supplement federal enforcement of the FCA would not be harmed, and allowed the settlement to act as a waiver. *Hall*, *supra*, 104 F.3d at 233.

Two other non-California cases which, one presumes, petitioner cited as "proof" of the alleged conflict regarding FCA claims, are a district court case from the Northern District of Ohio and a decision of this Court. Neither has any relevance here. The first, *Nguyen v. City of Cleveland*, 121 F. Supp.2d 643 (N.D.Ohio 2000), an employment retaliation action filed after a FCA "whistleblower" lost his job, says nothing whatsoever about whether FCA claims are waivable. The second, *United States v. Mezzanato*, 513 U.S. 196, 199-201, 115 S. Ct. 797, 801-802 (1995), a criminal matter, noted that legal rights generally and evidentiary rights specifically are subject to waiver by voluntary agreement of the parties, but never even mentioned FCA claims. Petitioner has shown neither error by California courts nor conflict with other courts, and this petition should be denied.

## CONCLUSION

This court has no jurisdiction to review this request for an advisory opinion regarding hypothetical questions, as no federal question is presented. There is no showing that California courts are in error with regard to the nonwaivability of certain federal claims or with regard to confidential settlements, nor that the California courts are in conflict with federal courts on these issues. This petition should be denied.

Respectfully submitted,

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No. 01-625

In The
**SUPREME COURT OF THE UNITED STATES**

CLIFFORD J. JOHNSON, Petitioner

v.

STANFORD UNIVERSITY, et al., Respondents

On Petition For Writ Of Certiorari To The
Court Of Appeal For The State Of California,
Sixth Appellate District

# REPLY TO BRIEF IN OPPOSITION

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15pp

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### Statutes

United States Code title 31 section 3729 et seq.("FCA") *passim*

### Abbreviations

PB = Petition For Writ Of Certiorari

BO = Brief In Opposition

## 1. The Two Settlement Terms Are *Not* Disputed.

At PB 5, petitioner accepts, arguendo, all findings as to the settlement terms, including that he knowingly agreed: (1) not to file prospective claims under the bounty hunter and whistleblower provisions of the FCA; and (2) not to disclose the settlement sum to the federal government, unless compelled to by legal process.

Respondents contrive to disclaim the concreteness of these fiercely fought over terms. At BO 9, 10 they add boldface and italics to the questions, thus: "***If***, to enforce a private contract, a (state) court enters an order..." They read the questions as directed not at the deterrent ruling herein, but at "such rulings...in the event that some court, some day, might issue them against someone under unknown circumstances." Their generic disclaimers are:

> [P]etitioner does *not* seek review of a dismissal by any court of any [FCA] claim... Once again, petitioner does *not* seek review of a ruling of any court which has prohibited him from communicating with a government official.

In fact, the prohibitive and deterrent operation of the settlement order is undisputed. Respondents case statement begins by announcing that petitioner seeks to "renege on a negotiated settlement of all of his claims." BO 1. That the settlement order does *not* free petitioner to file FCA claims is certified by the word "renege," which invokes the holdings at PB 16, that a litigant who files suit in breach of a settlement waiver, faces restitution and punitive fee awards.

That the settlement order prohibits voluntarily disclosing the settlement sum to federal agencies, is certified in and by the point that the government's subpoena power is a sufficient mitigation. BO 12.

## 2. Petitioner Remedies His Omission Of *Astra*.

Acting pro per, petitioner apologizes for having filed a substandard petition *draft*, and is grateful for its acceptance. Thereafter, the telephone and mail situation confused matters. When petitioner realized that the filing did not discuss his leading authority, *EEOC v. Astra USA, Inc.* 94 F.3d 738, 742 (1st cir. 1996), he promptly produced, served, and express-mailed a corrected petition, offering the exceptional filing, while admitting fault. Respondents then sought advice as to whether the correction had been filed, and obtained an oral decision disallowing it in advance of receipt. Respondents also obtained an extension of time, citing the added argument for cause, and specifically a new point, supported by *Astra*.[1]

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[1] These facts are documented by letters to the court dated October 23 and November 11, 2001, from petitioner, and dated November 7, 2001, from respondents, who requested an extension of time because "the 'Reasons For Granting The Writ' section has been completely rewritten, and even includes a new 'reason' not argued in the original version."

*Astra* is properly introduced in reply to various new points. For example, it not only rebuts the argument, at BO 12, that the government's subpoena power sufficiently mitigates the confidentiality restriction, but does so in conjunction with the narrow tailoring issue. Perhaps most importantly, it turns around respondents' lack-of-law concern and mitigates their poor-case-vehicle concerns. It is also introduced to inform the court as to the weight of respondents' grand "Conclusion," namely:

> There is no showing that California courts are in error with regard to the nonwaivability of certain federal claims or with regard to confidential settlements, nor that the California courts are in conflict with federal courts on these issues.[2]

To these ends, point 3 comprises the paragraphs that cite *Astra*, as written in the corrected petition. To the extent these paragraphs restate briefed points, they apply *Astra*, and reply to new opposition points.[3]

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[2] Petitioner of course objects to the state's order *herein*. More to the point, respondents insist that this order is correct, under state law. For example, they reaffirm its narrow tailoring standard, and agree that *Cariveau v. Halferty* 83 Cal.App.4th 128 (2000) does not apply. BO 12, 13.

[3] For example, at BO 12 respondents dismiss a legal newspaper article, which reports the key text and disposition of cited bills, as "full of hearsay and editorializing." This is replied to at 4-5 below, by its introduction as a "verifiable persuasion" re legislative facts, *of which "[t]his court could take judicial notice."*

### 3. Under *Astra*, The Settlement Terms Violate Public Policy, And A Miranda-Like Standard Should Apply To General Releases And Confidential Settlements.

Re analogous employer regulation, *EEOC v. Astra USA, Inc.* 94 F.3d 738, 742 (1st cir. 1996) sets controlling federal standards. At bar were settlements that *explicitly* barred communications to the EEOC, and the filing of an EEOC action -- equivalent to the explicit terms refused by petitioner. See [PB] 8. Notwithstanding the EEOC's subpoena powers, *Astra* held the non-filing agreements against public policy, *if executed without EEOC consent*, owing to the key "role that the [initial] filing of a charge plays in the statutory scheme." *Id.* 746. It also held the confidentiality agreement void, because it would frustrate the purpose of "vindicat[ing] the public interest in preventing employment discrimination." *Id.* 744. The FCA statutory scheme, and its purpose of preventing fraudulent federal claims, so apply herein.

*Astra* ruled out tailoring. Having explained that "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest," it affirmed an injunction against "enforcing *any* contractual provisions that impede settling employees from assisting the EEOC," and noted that this would apply to sub-covenants not to disclose settlement terms. *Id.* 744, 745 n.6; emphasis in orig.

This court could take judicial notice of the fact that this state's corporations and legislature take for granted at least the de facto legality of literally global confidentially

pacts, where people are seriously injured or killed because of product defects or environmental hazards.[4] Yet, over a year ago, *Cariveau* [*supra*] seemingly outlawed more than such worst-case confidentiality pacts. How, then, can a statute that would more narrowly declare such pacts illegal, be fiercely fought over, and lose badly? How avoid the conclusion, that public policy is trumped routinely by corporate expectations unabashed?[5]

The routine reaping of illicit benefits through generally worded adhesive waivers and nondisclosure pacts, can only be encouraged by courts that routinely welcome them to clear dockets, and restrain them only, and only maybe, in the well suppressed event of a legal contest. In *Astra*, it took EEOC pressure and an appeal to secure an injunction requiring that settling employees be informed of their agreements' legal bounds.[6] This supports petitioner's position that, to conform

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4 [*Recorder* report of foiled Senate/House Bills. PB 26 n. 13.] Petitioner in good faith quotes this legal paper as a verifiable persuasion, mindful that this is not a brief on the merits.

5 Until it discovered *Astra's* secret settlements, the EEOC found the super low employee contact rate "sinister." *Id.* 742. The paucity of secret settlement case law likewise shows only an intended effect. [*Recorder* report of secret settlement volume causing trial court herein to generally close case files.]

6 "We need not probe this point more deeply, because *Astra* now interprets the confidentiality language as inapplicable to communications between settling employees and the EEOC relevant to an ongoing investigation." *Id.* 745 n. 6. (Incidentally, this court

with public policy, waiver and confidentiality agreements *ordinarily* require a Miranda-like recitation of such inviolate rights to act in the federal interest, and to communicate concerns to federal regulators, as might otherwise be given or, more precisely, taken away.

### 4. The Questions Presented Are Federal

Respondents' point that this court has no jurisdiction to invalidate the state's order, because no federal question is raised, begins as follows (BO 7):

> A glance at petitioner's "Questions Presented" shows that...[t]here is no question here as to the validity of a treaty or a statute, federal or state, and no federal question is raised.

But such a glance shows that petitioner asks whether orders enforcing agreements that involve federal claims and federal agencies are against public policy, and a settlement agreement that violates federal public policy may be invalidated by a federal court, as in *U.S. ex rel. Green v. Northrop Corp.* 59 F.3d 953 (1995).

Respondents then launch into evidentiary issues as to the meaning of the settlement terms, without explaining how they can be relevant, given petitioner's acceptance of the at issue findings. Where the meaning of settlement terms is not in dispute, there is no basis for resorting to evidence. *Miller*

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could take notice of records showing that the EEOC was investigating Stanford throughout petitioner's settlement talks.)

*Tabak Hirsch & Co. v. Commisioner of Internal Revnue*, 101 F.3d 7, 10 (2d cir. 1996). Besides, federal law also governs evidentiary standards for deciding whether agreements waive rights under the FCA or federal constitution. This point was never mentioned by respondents or state court, though made at every stage, e.g. (opening brief on appeal 41-42):

> [*Green, supra*] not only repeats (at 960) the "well established" governance of "federal common law [] to determine the validity of a release of a statutorily-conferred federal right"; it not only (at 957) recognizes ambiguity in the general release at bar; it even (at 961), from the vast pool of state law within the Ninth Circuit's jurisdiction, picks a single case as exemplifying its disapproval of "ironclad and enforceable general releases," namely, *Winet v. Price* [4 Cal.App.4th 1159, 1166-1169 (1992),] respondents' leading light.

## 5. Petitioner Did Not And Could Not Waive The Confidentiality Question.

Respondents assert that petitioner "never objected in the trial court to holding certain terms confidential [or] to entry of two sealing orders." He has shown otherwise,[7] and,

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[7] See PB 7-10 (negotiations), 16-18 (opposition to judgment). Respondents obscurely echo an argument on appeal, that petitioner waived confidentiality rights by not opposing ex parte applications for the sealing orders. His reply on appeal (at 21) explained that

once again, respondents mistakenly presume petitioner's at law capacity to waive public policy objections.

## 6. Petitioner Did Not Contemplate Settling His FCA Claims For A Further $25,000.

Though not relevant to the issues (except in that it would, ironically, sharpen them), because it is presented as an overriding disparagement, petitioner rebuts respondents' opening story-line, namely (BO p. 1):

> This appeal arose from petitioner Clifford Johnson's anger at not being able to renege on a negotiated settlement of all of his claims against his former employer, respondent Stanford University, and then to receive an additional $25,000 to settle his federal claims.

At BO 4, Respondents state that petitioner had hoped "to release those same FCA claims for $25,000, as set forth above." Set forth above was an excerpt from an "amazing declaration" of petitioner (ellipses and parentheses in orig.):

> ...[G]iven that I was seeking only a further $25,000 monetary satisfaction, I hoped that I need do no more than draft a federal claims complaint, using my already drawn allegations of multi-million dollar federal claims act violations.

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"the notice of the first motion for a sealing order was served a day after it had been granted, and no notice issued re the second."

But the preceding sentence was logically linked to the above:

> I would rather not have to initiate a second federal claims action to recover the additional satisfactions that I had decided to insist on, in exchange for a gentlemen's agreement not to so proceed. However, given...

The words "further" and "monetary" thus *added* the $25,000 sum to the *sine qua non*, non-monetary demands of the "gentlemen's agreement" at PB 9, for an admission of error and removal of the rehire bar.

The Appendix presents petitioner's trial court explanation of the $25,000 sum.

## 7. The FCA Waiver Question Is Ripe.

At PB 26, Petitioner cites coherent, but dichotomous and self-doubting, FCA waivability decisions, pointing out that this case offers a ripe opportunity to definitively draw the waivability line, *if there is one*, between bounty hunter and whistleblower suits. Respondents claim that *Nguyen v. City of Cleveland* 121 F.Supp.2d 643 (N.D. Ohio 2000) says "nothing whatsoever about whether [whistleblower] claims are waivable." BO 15. *Nguyen's* holding, that state courts have *full* jurisdiction to decide such claims, would seem to include waivers. If not, for this particular holding, see *U.S. ex rel. Summit v. Michael Baker Corp.* 40 F.Supp.2d 772 (E.D.Va. 1999).

## 8. Re Confidentiality, The Lack Of Law Reflects Suppressive Mechanics That Enhance The Issue.

The above discussion of *Astra* reveals the mechanics that effectively frustrate the development of secret settlement case law. Its 1995 injunction, requiring that employee settlors be told they could talk to the EEOC, had no effect on respondents' settlement practices, in 1998.

The lack of effective law equates to the unchecked imposition of literally global confidentiality on injured lay parties. The need for a national standard seems plain, and, in light of public purse and safety implications, why brook further delay?

## CONCLUSION

For the foregoing reasons, respondents' opposition serves only to underscore the reasons for granting the writ.

Respectfully submitted,

_____ Date _____

Clifford Johnson, Petitioner pro se.

## APPENDIX: RECORD RE $25,000

*Excerpt Of Memorandum Of Points And Authorities In Opposition To The Motion To Enforce The Purported Settlement (p. 4) filed March 19, 1999.*

As recounted at PD[Plaintiff's Declaration] ¶ 6, at about the end of November, Plaintiff suffered additional damages so substantial and so gratuitously imposed by Defendant that he decided that he absolutely could not let them pass. They arose from the surprising service of a burdensome and defamatory subpoena on Plaintiff's employer for the previous five years. From the day of commencement of this employment, Plaintiff had expressly and emphatically terminated all his employment-related damages. A snapshot of the unfortunate affair is provided by the resume given under point C in Plaintiff's November 13 letter to Defendant, shown at PD Ex.2.[8] The egregious indifference of

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[8] Plaintiff wrote (emphasis in original):

> The subpoena raises the specter of potentially drastic further damages, by gravely interfering in an employment relationship built by Plaintiff over five years. Issued unilaterally, *for thin and disputed cause, and with a determination as to its allowability imminent*, it manifestly risks potentially drastic damage to Plaintiff, for vacated cause. What cause could be thinner than a need to disprove emotional damages the existence of which the Plaintiff has emphatically denied? What out-of-the-blue discovery could be more vicious to a wrongfully terminated adversary who has

Defendant's counsel caused Plaintiff to resolve to seek additional compensation. For example: Defendant served the subpoena in violation of a stipulation it had drafted, in which the parties promised to put off depositions until the conclusion of the settlement negotiations; Defendant not only opposed Plaintiff's ex parte application for a short stay to accomplish this, but sought sanctions, characterizing the application as a "frivolous, dishonest stunt"; Defendant asserts in this proceeding (DM[Defendants' Memorandum] 1) that Plaintiff is "obviously sorry to have relinquished his primary source of entertainment in life"; and Defendant dismisses the additional sum sought as a baseless attempt "to hit Stanford up for more money" (DM at 8). Defendant's blindness to the fact that it had gratuitously imposed a real and extreme form of damage escalation naturally resolved Plaintiff to insist on an additional $25,000 at the December 11, 1998 settlement conference. He elected to package this additional demand with his standing offer to settle his prospective federal claims, so as to let stand the settlement terms reached in the September mediation, all else being a pool of considerations additional thereto.

[Petitioner was laid off in July, 1999, in the course of a reorganization, for legally sufficient cause.]

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successfully curtailed his damages, or risk more cost to the client on whose behalf it is conducted? For further details, see PD ¶ 6.